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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16 SAN FRANCISCO DIVISION

17 Case No.: 3:18-cv-04865-EMC

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19 IN RE TESLA, INC. SECURITIES
LITIGATION
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**NOTICE OF MOTION AND
MOTION TO DISMISS
CONSOLIDATED COMPLAINT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT
THEREOF**

Date: March 5, 2020

Time: 1:30 p.m.

Dept.: Courtroom 5, 17th Floor

Judge: Hon. Edward M. Chen

Date Action Filed: August 10, 2018

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1 **NOTICE OF MOTION AND MOTION TO DISMISS**

2 PLEASE TAKE NOTICE that on March 5, 2020, at 1:30 p.m., before the Honorable
 3 Edward M. Chen of the United States District Court for the Northern District of California,
 4 defendants Tesla, Inc. (“Tesla” or the “Company”), Elon Musk (“Mr. Musk”), and certain current
 5 and former members of Tesla’s Board of Directors (Brad W. Buss, Robyn Denholm, Ira
 6 Ehrenpreis, Antonio J. Gracias, James Murdoch, Kimbal Musk, and Linda Johnson Rice)
 7 (referred to as the “Director Defendants”) move to dismiss the Consolidated Complaint for
 8 Violations of the Federal Securities Laws (the “CC”). Defendants move pursuant to Fed. R. Civ.
 9 P. 9(b) and 12(b)(6) and the Private Securities Litigation Reform Act of 1995 (“PSLRA”) on the
 10 grounds that plaintiff fails to state a claim for violation of Sections 10(b) and 20(a) of the
 11 Securities Exchange Act of 1934. This motion is based on the Memorandum of Points and
 12 Authorities below, defendants’ Request for Judicial Notice and for Consideration of Documents
 13 Incorporated by Reference, the Declaration of Jennifer C. Bretan and attached exhibits¹, the
 14 arguments of counsel, and any other matters properly before the Court.

15 **ISSUES TO BE DECIDED**

16 1. Should the Section 10(b) claim against Elon Musk be dismissed where plaintiffs
 17 (i) fail to allege specific facts showing that he made a false or misleading statement, and (ii) fail
 18 to plead particularized facts giving rise to a strong inference of scienter?

19 2. Should the Section 10(b) claim against Tesla, which is based entirely on Mr.
 20 Musk’s statements as a potential bidder, be dismissed where (i) plaintiff fails to plead falsity and
 21 scienter as to Mr. Musk, and (ii) there are no facts showing that Tesla was the “maker” of the
 22 challenged statements or had “ultimate authority” over them?

23 3. Should the Section 10(b) claim be dismissed where plaintiff fails to plead loss
 24 causation?

25 4. Should the Section 20(a) claim against the Director Defendants be dismissed
 26 where there is no underlying violation by Tesla, and where the allegations contradict any claim
 27 that they controlled Mr. Musk’s challenged statements as a bidder?

28 ¹ Unless otherwise noted, references to Exhibits (“Ex.”) are to the Bretan Declaration.

1 **I. INTRODUCTION**

2 Plaintiff's allegations, focusing on tweets made by Elon Musk on August 7, 2018
 3 regarding a take-private transaction he was "***considering***," do not come close to pleading
 4 securities fraud. Stripped of legally improper, almost wholesale reliance on unadjudicated
 5 allegations made by the SEC – the settlement of which expressly allows Mr. Musk and Tesla to
 6 challenge the sufficiency of all allegations here – plaintiff offers a fraud theory that makes no
 7 sense. Viewed reasonably and objectively, it fails as a matter of fact, law and common sense.

8 Rather than being inconsistent with his private statements (as in most securities cases), the
 9 August 7 tweets ***mirror precisely*** what Mr. Musk privately told Tesla's Board days earlier about
 10 his goals, rationale, and funding for taking Tesla private. On August 2 and 3, Mr. Musk indicated
 11 to Tesla's Board that: (1) he believed Tesla would operate more effectively as a private company;
 12 (2) he desired to take Tesla private at \$420 per share; (3) he hoped for a structure in which anyone
 13 who wished to remain a shareholder would be allowed to do so, in a manner similar to SpaceX
 14 (another of Mr. Musk's companies); and (4) based on almost two years of lobbying by Saudi
 15 Arabia's Public Investment Fund ("PIF"), including a July 31, 2018 meeting in which PIF again
 16 urged him to take Tesla private, he had more than enough funding for the transaction he was
 17 contemplating. In other words, ***days prior to any public disclosure***, Mr. Musk had ***already*** started
 18 the process of evaluating the transaction he was considering because he believed it made sense.

19 The timing of Mr. Musk's public disclosure was prompted by a leak, appearing in the
 20 *Financial Times* on the morning of August 7, of PIF's recent acquisition of nearly 5% of Tesla's
 21 stock on the open market, causing an immediate spike in Tesla's stock price. PIF had just told Mr.
 22 Musk of its purchase on July 31. Concerned his discussions with PIF regarding taking Tesla
 23 private would also leak, Mr. Musk moved quickly to ensure that all shareholders were privy to his
 24 intentions at once. As Mr. Musk explained, "the right thing to do was to announce my intentions
 25 publicly," so that all shareholders had information at "the same time."

26 Utilizing his personal Twitter account, and acting in the capacity of a bidder, Mr. Musk
 27 publicly advised (just 30 minutes after the *Financial Times* story): "Am ***considering*** taking Tesla
 28 private at \$420. Funding secured." In a blog post that day and in subsequent tweets, Mr. Musk

1 explained his rationale for “considering” whether or not to take this action, expressed his “hope”
 2 to structure a transaction so that current shareholders could remain with a private Tesla, said he
 3 was still “considering” whether or not to move forward with a proposal, and noted that if he did,
 4 the decision would “ultimately” be up to Tesla’s shareholders. Just like the statements he made to
 5 the Board days earlier, Mr. Musk made these statements because he believed them, and the
 6 process that ensued evinces good faith. Mr. Musk retained leading financial and legal advisors to
 7 assist him. Tesla’s independent directors formed a special committee and also retained skilled
 8 advisors. So did Tesla. Every aspect of the process that followed shows serious consideration
 9 being given by all concerned to the transaction that Mr. Musk was considering.

10 Yet plaintiff’s case is predicated on the flawed premise that all of this was some sort of
 11 ruse to deceive investors and harm “short-sellers” by temporarily “inflating” Tesla’s stock price.
 12 That makes no sense. Mr. Musk stood to gain nothing by “lying” about his aspirations, and in fact
 13 gained nothing. As even plaintiff concedes, Tesla’s stock price had already risen sharply in the
 14 days before the tweets, surging 16% on August 1, 2018 after Tesla reported stellar results.
 15 Anyone shorting Tesla’s stock was already in the red prior to August 7. And, while Tesla’s stock
 16 price increased substantially (for just one day) on August 7, it quickly declined below pre-tweet
 17 levels, and articles like those referenced in the Complaint quote short-sellers *celebrating*, stating
 18 “the time has finally come for the great Tesla short” and the “potential payoff for a short position
 19 improves.” Indeed, published reports indicate that short-sellers *profited* by about \$1.2 billion
 20 during the alleged class period (August 7 to August 17, 2018). The notion that Mr. Musk
 21 privately told the Board what he was considering days earlier, triggering a formal process, just to
 22 **harm** short-sellers – who then actually profited – is implausible.

23 Ultimately, Mr. Musk decided not to pursue a transaction based on feedback he received
 24 from shareholders, who preferred Tesla to remain public. Mr. Musk explained his decision on
 25 August 24 (after the class period, which ends on August 17), and confirmed again that funding
 26 was no obstacle had shareholders supported it. That statement, which is not alleged to be
 27 misleading, is also consistent with what Mr. Musk said from the start.

28 The Complaint fails for multiple reasons. *First*, as to Mr. Musk, plaintiff pleads no facts

1 showing that his statements were false or materially misleading. Nor are there pleaded facts
 2 giving rise to the cogent and compelling inference of scienter the law demands; to the contrary,
 3 the indicia of Mr. Musk's good faith vastly outweigh any competing inference. At most,
 4 plaintiff's allegations suggest that Mr. Musk could have done "more" before tweeting on August
 5 7. But as this Court has recently held, allegations that amount to negligence, or even gross
 6 negligence, are insufficient to plead a fraud claim under Section 10(b). *See Park v. GoPro, Inc.*,
 7 2019 WL 1231175, at *22 (N.D. Cal. Mar. 15, 2019).

8 *Second*, as to Tesla, it was not the "maker" of any alleged misstatement. The challenged
 9 statements were made by Mr. Musk as a potential bidder, not by Tesla (the recipient of any bid).
 10 Given that Tesla is not alleged to have made any misstatements or acted with scienter (indeed,
 11 even the SEC made no such allegations), the Section 10(b) claim also fails as to Tesla.

12 *Third*, plaintiff cannot plead loss causation – that any decline in Tesla's stock price was
 13 due to a corrective disclosure of facts allegedly misstated.

14 *Fourth*, the addition of a "control person" claim under Section 20(a) against the newly
 15 added Director Defendants is an obvious afterthought. Not only does it fail because there is no
 16 viable Section 10(b) claim against Tesla, the Complaint admits that Mr. Musk's August 7 tweets
 17 (in his capacity as a bidder) were not cleared with anyone at Tesla, much less the Director
 18 Defendants. Accordingly, plaintiff cannot plead actual control over the alleged misstatements.

19 Mr. Musk and Tesla may have a high profile, but a fraud claim is a serious matter. It
 20 must be grounded in facts and needs to make sense. This case does not. It should be dismissed.

21 **II. STATEMENT OF FACTS**

22 **A. Mr. Musk's Discussions With PIF**

23 Well before his August 2018 tweets, Mr. Musk made no secret of his belief that Tesla
 24 could operate more efficiently as a private company. *See* CC ¶ 91 (quoting Nov. 15, 2017 *Rolling*
 25 *Stone* article: "I wish we could be private with Tesla. It actually makes us less efficient to be a
 26 public company"). This observation did not go unnoticed. For nearly two years, PIF pursued Mr.
 27 Musk with its interest in taking Tesla private. At PIF's request, a meeting between Mr. Musk and
 28 PIF's senior decision-maker was set for July 31, 2018. At the meeting, PIF revealed that it had

1 recently acquired almost 5% of Tesla's stock on the open market (just below the public reporting
 2 threshold), costing it billions of dollars, as a sign of its interest in Tesla. As Mr. Musk would
 3 publicly explain: “[d]uring the meeting, the Managing Director of the fund expressed regret that I
 4 had not moved forward previously on a going private transaction with them, and he strongly
 5 expressed his support for funding a going private transaction for Tesla at this time. I understood
 6 from him that no other decision makers were needed and that they were eager to proceed.” CC ¶
 7 103; Ex. K. As a result, “I left the July 31 meeting with no question that a deal with [PIF] could
 8 be closed, and that it was just a matter of getting the process moving.” *Id.*²

9 B. Discussion Of A Possible Transaction With The Board On August 2-3, 2018

10 The PIF meeting persuaded Mr. Musk to explore a take private transaction. To that end,
 11 he sent an email to Tesla's Board on August 2, entitled “Offer to Take Tesla Private at \$420.” CC
 12 ¶ 69; Ex. A.³ Mr. Musk stated his “firm belief that Tesla can operate more effectively as a private
 13 company.” As he explained, “being public during this period of rapid and often unpredictable
 14 growth”: (1) “[s]ubjects Tesla to constant defamatory attacks by the short-selling community,
 15 resulting in great harm to our valuable brand,” (2) “[p]uts great pressure on Tesla to make
 16 decisions for a given quarter that are suboptimal for long-term shareholder value creation,” and
 17 (3) “[c]auses wild swings in our share price, which are a constant distraction to Tesla employees,
 18 all of whom are shareholders, making it harder to focus on useful work.” *Id.* Mr. Musk made clear
 19 that his desired structure was for shareholders to have the choice to remain in a private Tesla. *Id.*

20 Tesla's Board met on August 2 without Mr. Musk present, and again on August 3 with
 21 him present. CC ¶¶ 72, 103. Mr. Musk told the Board of PIF's interest in funding a take private

22 ² Plaintiff assails the conclusions Mr. Musk drew because the meeting lasted only about 45
 23 minutes. But there is no reason that verbal commitments cannot be made quickly, especially
 24 given PIF's long history of interest and vast financial means. In fact, fast, multi-billion-dollar
 25 commitments by PIF are not at all unusual. *See, e.g.*, Ex. B. Published reports show, for example,
 26 that PIF committed \$45 billion to Softbank in a deal “famously agreed upon in a 45-minute
 27 conversation . . . before the two sides then spent months agreeing on the details.” Ex. X, Rory
 Jones, Summer Said & Maureen Farrell, *Saudi Arabia Goes High-Tech in Approach to Investing*,
 Wall St. J. (Aug. 15, 2018).

28 ³ Like most of his Complaint, plaintiff copies this allegation, without express attribution, from the
 SEC complaint. Such allegations have been repeatedly criticized by courts as improper and often
 stricken. *See Attia v. Google LLC*, 2018 WL 2971049, at *15 (N.D. Cal. June 13, 2018) (citing
 cases). Since plaintiff selectively quotes the email, defendants include it in full as Ex. A.

1 transaction. *Id.* He also explained that, similar to SpaceX, his goal was to permit existing
 2 shareholders to remain with a private Tesla if they wanted to do so. *Id.*

3 **C. Mr. Musk Discloses He Is Considering A Possible Offer On August 7**

4 On August 7 at 9:18 a.m. PDT, the *Financial Times* reported that PIF had acquired a \$2
 5 billion stake in Tesla. Ex. B. The stock price quickly “moved sharply higher.”⁴ The prior day,
 6 Tesla’s stock price closed at \$341.99 (Ex. T), but rapidly increased to \$356.67 on this news. *See*
 7 Ex. P at ¶ 75. The danger that a further leak of the potential take private transaction was acute.
 8 Mr. Musk concluded that “the right thing to do was announce my intentions publicly,” so that he
 9 was “sharing the same information with all investors at the same time.” CC ¶ 103; Ex. K.

10 Mr. Musk’s personal Twitter account had over 22 million followers as of August 2018,
 11 including major news outlets. *See* CC ¶¶ 2, 166. Given that he was speaking as a potential bidder,
 12 Mr. Musk sent a short tweet from his personal account, publicly announcing at 9:48 a.m. (only 30
 13 minutes after the *Financial Times* news broke): “Am **considering** taking Tesla private at \$420.
 14 Funding secured.” CC ¶ 74; Ex. C. (emphasis added). In subsequent tweets that day, he stated that
 15 “[m]y **hope** is *all* current investors remain with Tesla even if we’re private,” “[a]m super
 16 appreciative of Tesla shareholders,” and “[d]ef no forced sales. Hope all shareholders remain.
 17 Will be way smoother & less disruptive as a private company. Ends negative propaganda from
 18 shorts.” CC ¶¶ 79-80, 83; Exs. E-G.

19 Later that same day, Mr. Musk sent employees an email, also posted on Tesla’s public
 20 blog, entitled “Taking Tesla Private.” CC ¶ 84; Ex. I. Mr. Musk again stated “I’m **considering**
 21 taking Tesla private,” **but that a “final decision has not yet been made.”** *Id.* (emphasis added).
 22 He detailed the reasons, stressing that it was “all about creating the environment for Tesla to
 23 operate best.” *Id.* Mr. Musk indicated that he “would like to structure this so that all shareholders
 24 have a choice” – *i.e.*, “similar in many ways to [] SpaceX” – and that any proposal would need to
 25 be “finalized through a vote of our shareholders.” *Id.* Mr. Musk linked to the blog on his Twitter
 26 account at 12:36 p.m., with a short cover note: “Investor support is confirmed. Only reason why

27
 28 ⁴ See Ex. W, Jessica Dye, *Tesla shares move higher on Saudi Arabia fund stake*, *Financial Times* (Aug. 7, 2018); *see also* CC ¶ 90 (analyst report referencing *Financial Times* story).

1 this is not certain is that it's contingent on shareholder vote." CC ¶ 85; Ex. H.

2 Before the market opened on August 8, Tesla's independent directors issued a press
 3 release indicating that "[l]ast week, Elon opened a discussion with the board about taking the
 4 company private," and "[t]he board has met several times over the last week and is taking the
 5 appropriate next steps to evaluate this." CC ¶ 93; Ex. J. The Board subsequently announced that it
 6 had formed a special committee and had retained outside advisors. CC ¶ 106; Ex. M.

7 **D. Mr. Musk Provides Additional Information On August 13, 2018**

8 On August 13, Mr. Musk posted an "Update on Taking Tesla Private" with additional
 9 information on Tesla's blog. CC ¶ 103; Ex. K. Mr. Musk explained why he was "considering" a
 10 transaction, and why he notified the Board, in his "personal capacity," that he felt taking Tesla
 11 private would advance its best interests. *Id.* He also explained why he sent the August 7 tweet and
 12 said "funding secured." *Id.* Mr. Musk noted that he had "engaged advisors to investigate a range
 13 of potential structures and options," and to get to a "more precise understanding" on how many
 14 shareholders might remain if Tesla "became private." *Id.* He went on to explain, "[i]f and when a
 15 final proposal is presented, an evaluation process will be undertaken by a special committee of
 16 Tesla's board." *Id.* If that process "resulted in an approved plan, any required regulatory
 17 approvals will need to be obtained and the plan will be presented to Tesla shareholders for a
 18 vote." *Id.* Again, the speculative nature of a possible transaction was clear: Mr. Musk had not
 19 even decided to make an offer; the ability and willingness of existing shareholders to participate
 20 would need to be determined; if he did decide to make an offer, the Board would have to go
 21 through its processes; and shareholders would then have to approve it. If these contingencies were
 22 a surprise, Tesla's stock would have gone down. It went up instead. *See* Ex. T.

23 **E. Based On Shareholder Feedback, Mr. Musk Opted Not To Pursue A Deal**

24 After extensive input from shareholders, Mr. Musk ultimately decided not to pursue a take
 25 private transaction. He announced his decision, and the reasons for it, in a "Staying Public" blog
 26 post on August 24. CC ¶ 115; Ex. N. As Mr. Musk explained, a number of institutional investors
 27 conveyed that their internal compliance rules put limits on private company investments. *Id.* Mr.
 28 Musk also came to learn, contrary to his belief on August 7 and prior experience with SpaceX,

1 that “[t]here is also no proven path for most retail investors to own shares” if Tesla were private.
 2 *Id.* While he had decided not to proceed based on this feedback, he reiterated that “there is more
 3 than enough funding to take Tesla private [and this] was reinforced during this process.” *Id.*

4 **F. The SEC Litigation And Settlements**

5 According to news reports, the SEC began an investigation on August 8, 2018, one day
 6 after Mr. Musk’s tweets. CC ¶ 98. On September 27, the SEC filed suit against Mr. Musk under
 7 Section 10(b). Ex. P. On September 29, the SEC sued Tesla for a “disclosure controls” violation
 8 of Rule 13a-15 of the 1934 Act, alleging it lacked policies that “specifically addressed Musk’s⁵
 9 use of Twitter.” Ex. Q, ¶¶ 1, 33. The SEC did not claim that Tesla made any misstatements or
 10 acted with scienter. No claims of any kind were asserted against Tesla’s directors.

11 Both cases were settled on September 29. Nothing was adjudicated and the resolution was
 12 reached by consent “without admitting or denying the allegations” solely as to the SEC. Both Mr.
 13 Musk and Tesla expressly reserved the unfettered “right to take legal or factual positions in
 14 litigation or other legal proceedings in which the [SEC] is not a party.” Ex. R, ¶ 13; Ex. S, ¶ 14.⁵

15 **G. This Case**

16 On August 10, 2018, the first of a series of securities class actions was filed alleging that
 17 “funding secured” was false and misleading. The suits named only Mr. Musk and Tesla as
 18 defendants. After consolidation, the Court appointed Glen Littleton as lead plaintiff, who filed the
 19 current Complaint, and later supplemented it on November 11, 2019 with a Chart per the Court’s
 20 Standing Order. Other than adding references to news stories and analyst reports, plaintiff’s
 21 pleading is almost a verbatim copy, without attribution, of the SEC’s uncontested allegations against
 22 Mr. Musk. It also claims that Tesla violated Section 10(b), although the SEC brought no such
 23 charge. And, for the first time, it adds the Director Defendants, claiming they violated Section
 24 20(a) by failing to control Tesla, even though the SEC made no such claim (and Tesla made no
 25 statements, much less with scienter).

26
 27 ⁵ Plaintiff ignores the plain meaning of these provisions, and openly misstates other aspects of the
 28 settlement, claiming that Mr. Musk “admits or does not deny” the SEC allegations. CC ¶¶ 170-71.
 That is flatly wrong, as anyone reading the documents would know.

1 **III. PLAINTIFF'S CLAIM IS SUBJECT TO STRICT PLEADING REQUIREMENTS**

2 Under Section 10(b), plaintiff must plead: "(1) a material misrepresentation or omission;
 3 (2) scienter; (3) a connection between the misrepresentation or omission and the purchase or sale
 4 of a security; (4) reliance; (5) economic loss; and (6) loss causation." *Or. Pub. Emps. Ret. Fund v.*
 5 *Apollo Grp. Inc.*, 774 F.3d 598, 603 (9th Cir. 2014). Each element requires particularized facts
 6 satisfying Rule 9(b) and the "formidable" pleading standards of the PSLRA. *Metzler Inv. GMBH*
 7 *v. Corinthian Colls., Inc.*, 540 F.3d 1049, 1055 (9th Cir. 2008); *see also Sgarlata v. PayPal*
 8 *Holdings, Inc.*, 2019 WL 4479562, at *4-5 (N.D. Cal. Sept. 18, 2019).

9 Specific contemporaneous facts showing falsity are required, not mere "fraud by
 10 hindsight." *GoPro*, 2019 WL 1231175, at *9, 13. A fact is material only if "a reasonable investor"
 11 would view it "as having significantly altered the 'total mix' of information." *Matrixx Initiatives, Inc. v. Siracusano*, 131 S. Ct. 1309, 1321-22 (2011). An omission must affirmatively create "an
 12 impression of a state of affairs that differs in a material way from the one that actually exists,"
 13 and a statement is not actionable merely because it is incomplete. *Brody v. Transitional Hosps. Corp.*, 280 F.3d 997, 1006 (9th Cir. 2002).

14 Plaintiff must also plead specific facts raising a strong inference of scienter – an intent to
 15 defraud or deliberate recklessness so egregious as to be tantamount to actual intent. *Webb v. SolarCity Corp.*, 884 F.3d 844, 850-51 (9th Cir. 2018). The inference "must be more than merely
 16 plausible or reasonable – it must be cogent and at least as compelling as any opposing inference
 17 of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 314 (2008).

18 Finally, plaintiff needs to plead loss causation – that a "revelation of fraudulent activity"
 19 caused Tesla's stock price decline. *Loos v. Immersion Corp.*, 762 F.3d 880, 887 (9th Cir. 2014).

20 **IV. MR. MUSK'S STATEMENTS ARE NOT ACTIONABLE**

21 **A. The August 7, 2018 Statements Were Not False Or Misleading**

22 Despite the many compelling reasons why Mr. Musk was considering taking Tesla
 23 private, plaintiff attacks three aspects of his statements on August 7: (1) "funding secured" (in his
 24 initial tweet); (2) that he "envisioned" and "hoped" for and "would like" a structure allowing
 25 shareholders to remain in a private Tesla if they so choose (in several tweets and a blog post); and

1 (3) that the “only reason this is not certain is that it’s contingent on a shareholder vote” (in a
 2 tweet). Plaintiff’s claim fails in each case.

3 **1. Funding Secured**

4 The only reasonable interpretation of Mr. Musk’s “funding secured” statement on August
 5 – which *mirrors precisely* what he told the Board days earlier – is that funding would be no
 6 obstacle if he decided to proceed with a transaction. It would make no sense to tell the Board he
 7 had funding, and to set in motion the extensive machinery of taking Tesla private (*e.g.*, retaining
 8 lawyers and financial advisors, convening a special committee), if he believed otherwise. Plus,
 9 funding was *not* an issue: as Mr. Musk announced on August 24 (in a post-class period statement
 10 that is not challenged), there was more than ample funding to take Tesla private. CC ¶ 115. The
 11 statement was not false on August 2, when Mr. Musk emailed the Board with his preliminary
 12 proposal and rationale. It was not false on August 3, when he met with the Board to discuss a
 13 potential transaction. It was not false on August 7, when he publicly stated that funding was no
 14 impediment. And it was not false in hindsight.

15 Plaintiff has no answer to the consistency between Mr. Musk’s private and public
 16 statements about funding and the process that ensued. Instead, plaintiff tries to read an altogether
 17 different meaning into “funding secured,” so that anything short of a “formal agreement” with
 18 PIF as of August 7, with specific “deal terms” and “price” discussed and agreed, renders the
 19 statement misleading. CC ¶ 121 (Chart #1). But Mr. Musk *never said* he had done any of those
 20 things. He was, after all, at the very outset of a process, “considering” whether to make an offer.
 21 Both the market reaction to his statement, and the context, belie plaintiff’s claim.

22 Contrary to plaintiff’s rigid interpretation, the phrase “funding secured” has no universal
 23 meaning. As the August 8 analyst report by Evercore (quoted in the Complaint) recognized, it
 24 could mean a range of things, from a written commitment to something far less:

25 It is important to note that, as of today, no details have been provided with regards
 26 to what “funding secured” means, who is providing that funding and what any
 27 potential funding structure might look like. Our view is that “funding secured”
 should be interpreted as a strong verbal commitment, with funds available and
 parties willing to execute quickly. However, it could be less than this. (CC ¶ 97)

28 While some investors may have desired more detail or even questioned what Mr. Musk meant,

1 Section 10(b) is not meant to police statements that are merely incomplete. *See Brody*, 280 F.3d at
 2 1006. Words do not mislead just because they may be susceptible to varying interpretations; they
 3 mislead only if they “affirmatively create an impression of a state of affairs that differs in a
 4 material way from the one that actually exists.” *Id.*; *see also In re PayPal Holdings Inc. S’holder*
 5 *Deriv. Litig.*, 2018 WL 466527, at *4 (N.D. Cal. Jan. 18, 2018). This is true “even if investors
 6 would consider the omitted information significant.” *In re Rigel Pharms., Inc. Sec. Litig.*, 697
 7 F.3d 869, 880 n.8 (9th Cir. 2012). And if a statement is susceptible to a reading that is “consistent
 8 both with the lead plaintiffs’ deduction . . . and with the opposite conclusion,” that also fails to
 9 state a claim. *In re OmniVision Techs., Inc. Sec. Litig.*, 937 F. Supp. 2d 1090, 1101 (N.D. Cal.
 10 2013). Thus, it is not enough for plaintiff to point to his *preferred* interpretation and say “funding
 11 secured” was misleading. He must plead facts “necessarily inconsistent” with the challenged
 12 statement (*In re Read-Rite Corp.*, 335 F.3d 843, 846-48 (9th Cir. 2008)). He has not done so.

13 Indeed, at the time of Mr. Musk’s statement, matters were in an early stage with
 14 circumstances inherently in flux.⁶ While the tweet conveyed his belief that funding would be
 15 available, that is a far cry from saying that “formal documentation” setting forth “all deal terms”
 16 with financing parties was in place. In fact, it was clear that important terms had yet to be
 17 determined: most notably, **how many shares of Tesla would be acquired** if a take private
 18 transaction were pursued, and hence the cost of any deal. As Mr. Musk expressly stated on
 19 August 7, he “hoped” to use a structure where all Tesla shareholders would have the option of
 20 remaining in a private company, and **only those who did not wish to remain** would receive the
 21 \$420 per share price being considered. Ex. I. He also indicated that he “wouldn’t expect any
 22 shareholder” to have a “controlling vote” “if we go private.” Ex. D. Given that the cash to be paid
 23 was necessarily indeterminate, as was the ownership structure, the notion that a two-word tweet
 24 could **only** mean a written financing commitment, setting forth all terms, ignores the context of
 25 the statement. *See In re Yahoo! Inc. Sec. Litig.*, 2012 WL 3282819, at *12 (N.D. Cal. Aug. 10,
 26

27

⁶ Plaintiff repeatedly claims that Mr. Musk’s August 7 tweet implied that a deal was “imminent.”
 28 *See, e.g.*, CC ¶¶ 121, 124-25 (Chart #1-4, 6). But plaintiff cites nothing to support that argument.
 To the contrary, Mr. Musk said he was only “considering” a possible transaction – the decision to
 go ahead had not even been made – so there is no reasonable basis to infer a deal was imminent.

1 2012) (statements omitting certain adverse facts on restructuring not misleading where
 2 discussions were “ongoing”), *aff’d*, 611 F. App’x 387 (9th Cir. 2015); *see also Matrixx*, 563 U.S.
 3 at 44 (statements evaluated “in the light of the circumstances under which they were made”).⁷

4 The Complaint itself shows that the market was not “misled” in the way plaintiff claims.
 5 Addressing any confusion that may have existed, Mr. Musk’s August 13 blog post devoted an
 6 entire section to “Why did I say ‘funding secured’?” CC ¶ 103; Ex. K. Mr. Musk described the
 7 factors leading him to leave the July 31 PIF meeting “with no question that a deal with the Saudi
 8 sovereign fund could be closed, and that it was just a matter of getting the process moving.” *Id.*
 9 This was why he “referred to ‘funding secured’ in the August 7th announcement.” *Id.* The blog
 10 post was clear that there was no formal, written agreement with deal terms and price negotiated
 11 and agreed upon (as plaintiff claims the August 7 tweet implied). Yet the stock price *went up* on
 12 the day of the blog post (from \$355.49 to \$356.41), not down (as one would have expected if the
 13 blog revealed facts that were “necessarily inconsistent” with his earlier tweet). *See* Ex. T.

14 At most, plaintiff might argue the tweet was ambiguous or even incomplete, but it was not
 15 inconsistent with the facts as Mr. Musk knew them. Plaintiff therefore fails to plead falsity. *See*
 16 *Rigel*, 697 F.3d at 881 (no falsity where “the subsequent release of more extensive information
 17 . . . was not inconsistent with” earlier statement); *Brody*, 280 F.3d at 1007 (press release noting
 18 “expressions of interest,” but not disclosing actual takeover proposals, not misleading because
 19 still “consistent with the more detailed explanation”); *Ronconi v. Larkin*, 253 F.3d 423, 434 (9th
 20 Cir. 2001) (undisclosed “circumstances are not inconsistent with the statements [at issue]”).⁸

21 **2. The “Intended” Structure Mr. Musk “Envisioned” And “Hoped For”**

22 The August 7 statements describing the possible structure Mr. Musk “envisioned,” “hoped
 23 for,” “intended” and “would like” were plainly aspirational. There is no dispute that this was Mr.
 24 Musk’s true aim; indeed, he told the Board the same thing from the start. Such sentiments are not

25 ⁷ Plaintiff’s allegation that Mr. Musk’s reference to \$420 (in response to a question “[a]t what
 26 price”) was false or misleading is frivolous. *See* CC ¶ 122 (Chart #2). No facts suggest that Mr.
 27 Musk was not considering making an offer at that price.

28 ⁸ For the same reasons, plaintiff’s attack on a portion of another tweet (*see* CC ¶ 130, Chart #6),
 in which Mr. Musk stated that “investor support is confirmed,” fails as it also related to whether
 or not funding was secured. *See* CC ¶¶ 123, 127, 129, 131.

1 actionable merely because they do not work out. *See Yourish v. Cal. Amplifier*, 191 F.3d 983, 997
 2 (9th Cir.1999) (“[I]t is clearly insufficient for plaintiffs to say that [a] later, sobering revelation[]
 3 makes[s] [an] earlier, cheerier statement a falsehood”); *In re Salomon Analyst Level 3 Litig.*, 350
 4 F. Supp. 2d 477, 489 (S.D.N.Y 2004) (“It is not sufficient ...to allege that an opinion was
 5 unreasonable, irrational, excessively optimistic, [or] not borne out by subsequent events”).

6 It was also clear that evaluation remained ongoing. On August 13, for example, Mr. Musk
 7 noted that he had engaged advisors “to investigate a range of potential structures and options.”
 8 CC ¶ 103; Ex. K. And, despite quoting liberally from analysts, plaintiff does not point to any who
 9 viewed such a potential structure as impossible to achieve. *See* CC ¶¶ 90-91, 95, 97, 105. To the
 10 contrary, analysts viewed it as feasible, even pointing to SpaceX as an example. *Id.* ¶ 95.

11 Ignoring all of this, plaintiff nonetheless claims Mr. Musk’s statements were misleading
 12 because, prior to his tweet, he was allegedly told that the contemplated structure was “difficult” or
 13 “unprecedented.” CC ¶ 147; *see* Chart #3-5, 7. But a view that something is “difficult” or
 14 “unprecedented” does not render the stated structure he desired *false*. If anything, Mr. Musk’s
 15 career is a testament to his ability to overcome what is perceived as “difficult” and achieve the
 16 “unprecedented” – *e.g.*, against all odds, building Tesla from scratch into a thriving manufacturer
 17 of acclaimed, all-new, all-electric vehicles and sustainable energy products and revolutionizing
 18 space technology by designing, manufacturing, and launching advanced rockets at SpaceX. That
 19 something may be challenging is a far cry from a knowing fraud, especially when the statement
 20 concerns a hope, desire, or goal. *See Ronconi*, 253 F.3d at 434 (“Problems and difficulties . . . do
 21 not make a lie out of any of the alleged false statements”).

22 As explained on August 24, it was only after the alleged class period that Mr. Musk came
 23 to the realization that “[t]here is also no proven path for most retail investors to own shares if we
 24 were private.” CC ¶ 115. Mr. Musk told the SEC this was “a fundamental misunderstanding that I
 25 just did not know – I thought there would be some way to retain small investors, but there isn’t.”
 26 *Id.* ¶ 147. A mistake, however, is not fraud. “[F]alsity is a failure to be truthful – it is not a
 27 misapprehension, misunderstanding or mistake of fact at the time a statement was made.” *In re*
 28 *Lululemon Sec. Litig.*, 14 F. Supp. 3d 553, 571 (S.D.N.Y. 2014); *see Jackson v. Fischer*, 2015

1 WL 1143582, at *9 (N.D. Cal. Mar. 13, 2015) (“that certain predictions proved incorrect is not
 2 the same as alleging with particularity facts that show the initial prediction was a falsehood”).

3 Plaintiff also fails to plead falsity simply because Mr. Musk later learned that some
 4 institutional shareholders had “internal compliance issues that limit how much they can invest in
 5 a private company.” CC ¶ 115; Ex. N. The point of the process Mr. Musk initiated was to find out
 6 ***whether*** shareholders would support a take private transaction. The fact that some later advised
 7 Mr. Musk they did not, or could not because of ***their own internal*** investment rules, simply goes
 8 to the ***ultimate level of support*** for a transaction, but does not suggest Mr. Musk was committing
 9 fraud by disclosing what he was “considering.” In any event, the claim is pure fraud by hindsight:
 10 there are no pleaded facts that even suggest that Mr. Musk knew of these internal restrictions, or
 11 the personal views of these investors, on August 7. *See GoPro*, 2019 WL 1231175, at *13.⁹

12 3. The “Only” Contingency Was A Shareholder Vote

13 The securities laws do not operate under the assumption that “investors are nitwits.”
 14 *Basic, Inc. v. Levinson*, 485 U.S. 224, 234 (1988). Yet plaintiff does exactly that by alleging that
 15 Mr. Musk’s tweet that a transaction was “[o]nly . . . contingent on a shareholder vote” suggested
 16 ***nothing else*** needed to happen for a transaction to occur, and so was misleading. *See* CC ¶¶ 130-
 17 32, Chart #6. No reasonable investor would read the statement that way. Just three hours earlier,
 18 Mr. Musk had announced he was “considering” taking Tesla private, so the notion that he had
 19 wrapped up that process in a matter of hours defies logic. Moreover, the tweet (which is character
 20 constrained by design) also linked to a blog post in which Mr. Musk offered expansive comments
 21 emphasizing the numerous uncertainties – including that Mr. Musk was “considering” taking
 22 Tesla private but ***even he*** had not made “a final decision.” CC ¶¶ 84-85; Exs. H-I.

23 There is no way to read these statements ***in context*** and conclude that a private Tesla was
 24 at the finish line, with but one hurdle (a shareholder vote) to clear. While the tweet underscored
 25 Mr. Musk’s guiding principle that Tesla shareholders would have “ultimate” say in whether to go

26 ⁹ Plaintiff also alleges that Mr. Musk should have disclosed on August 7 that he believed there
 27 was a 50% chance of a deal being consummated. *See* CC ¶ 121. But the securities laws do not
 28 require Mr. Musk to publicly handicap a transaction. And, far from suggesting bad faith, this
 allegation shows the opposite: Mr. Musk believed there was an equally good chance that such a
 transaction would move forward and was worth exploring.

1 private, it was obvious that any transaction would need to be carefully structured, vetted and
 2 approved by multiple stakeholders, including Tesla's Board and regulators. Indeed, on August 8,
 3 Tesla's independent directors issued a press release stating that a process was just getting started.
 4 CC ¶ 93; *see id.* ¶ 106 (formation of special committee). Because it was clear that there would be
 5 many moving pieces beyond a simple shareholder vote, nothing in the tweet substantially altered
 6 the total mix of information available in the market. *See Basic*, 485 U.S. at 231-32.

7 B. The August 13, 2018 Statements Were Not False Or Misleading

8 As for August 13, plaintiff makes only two further allegations, and neither withstands
 9 scrutiny. *First*, plaintiff attacks Mr. Musk's stated "***belief***" that there was "no question that a deal
 10 with the Saudi sovereign fund could be closed," claiming there was "uncertainty" since funding
 11 "***might*** be contingent upon whether Tesla would build a production facility in the Middle East."
 12 CC ¶ 137 (emphases added); Chart #8. But to be actionable, a statement of belief or opinion must
 13 be both subjectively and objectively untrue. *Omnicare v. Laborers Dist. Council Constr. Indus.*
 14 *Pension Fund*, 135 S. Ct. 1318, 1327 (2015); *City of Dearborn Heights Act 345 Police & Fire*
 15 *Ret. Sys. v. Align Tech., Inc.*, 856 F.3d 605, 615-16 (9th Cir. 2017). Plaintiff fails on both counts.
 16 There are no facts to suggest Mr. Musk did not truly believe a deal could be done with the PIF,
 17 nor is the mere possibility that PIF ***might*** condition funding on a local production facility an
 18 objective "fact" rendering his opinion untrue. Pleading falsity based on alleged omissions is "no
 19 small task" (*Omnicare*, 135 S. Ct. at 1332), and plaintiff's weak effort does not come close.

20 *Second*, plaintiff assails Mr. Musk's August 13 tweet that he was "excited to work with
 21 Silver Lake and Goldman Sachs as financial advisors" as misleading because he had not yet
 22 "signed an agreement to formally engage or retain" them. CC ¶¶ 139-40; Chart #9. But there is
 23 nothing unusual (or alleged to be so) about working with advisors prior to "formal" engagement
 24 agreements being signed. And there is no dispute that ***both of those advisors did work with Mr.***
 25 ***Musk*** to evaluate taking Tesla private. Plaintiff's claim is baseless.

26 C. The Scienter Allegations Are Woefully Deficient

27 Under *Tellabs* (551 U.S. at 323), plaintiff needs to plead specific facts giving rise to a
 28 strong inference that a defendant acted with the intent to mislead or with deliberate recklessness.

1 See *GoPro*, 2019 WL 1231175, at *20, citing *Zucco Partners, LLC v. Digimarc Corp.*, 552 F.3d
 2 981, 991 (9th Cir. 2009). Deliberate recklessness is “a highly unreasonable omission, involving
 3 not merely simple, or even inexcusable negligence, but an extreme departure from the standards
 4 of ordinary care, and which presents a danger of misleading buyers or sellers that is either known
 5 to the defendant or is so obvious that the actor must have been aware of it.” *Id.* at *12, quoting
 6 *DSAM Glob. Value Fund v. Altris Software, Inc.*, 288 F.3d 385, 389 (9th Cir. 2002). Even where
 7 “the complaint sets out a compelling case of negligence – perhaps even gross negligence – but
 8 does not give rise to a strong inference that [defendant] acted with an intent to defraud, conscious
 9 misconduct, or deliberate recklessness, as is required in a securities fraud case.” *Id.* at *22.

10 The “bar set by *Tellabs* is not easy to satisfy.” *Webb*, 884 F.3d at 855. The test is
 11 subjective: scienter is not pleaded when a defendant acts in good faith. See *Colyer v. Acelerx*
 12 *Pharms., Inc.*, 2015 WL 7566809, at *13 (N.D. Cal. Nov. 25, 2015) (“knowing about the
 13 existence of [problems] and knowing that one should report these [problems] to the public are two
 14 different things”); see also *Dirks v. SEC*, 463 U.S. 646, 662 (1983) (no scienter if a defendant
 15 “mistakenly think[s] the information . . . is not material”); *SEC v. Platforms Wireless Int'l Corp.*,
 16 617 F.3d 1072, 1093 (9th Cir. 2010) (“the ultimate question is whether the defendant knew his or
 17 her statements were false, or was consciously reckless as to their truth or falsity”).

18 The Court looks at the allegations holistically, weighing plaintiff’s allegations against any
 19 “plausible, nonculpable explanation.” *Tellabs*, 551 U.S. at 323-24, 326. Under this “inherently
 20 comparative” inquiry, a complaint survives “only if a reasonable person would deem the
 21 inference of scienter cogent and at least as compelling as any opposing inference.” *Id.* Here, the
 22 indicia of good faith are overwhelming and more than outweigh any contrary inference.

23 First, rather than being inconsistent with his private statements, the August 7 tweets were
 24 consistent with what Mr. Musk told Tesla’s Board on August 2 and 3. He hired lawyers and
 25 financial advisors to assist him, and Tesla’s Board formed a special committee and retained its
 26 own advisors, none of which would make any sense unless Mr. Musk firmly believed what he
 27 said. Indeed, the process that ensued shows that everyone involved was acting in good faith.

28 Second, the August 7 tweets were a good faith effort to advise all shareholders of the

1 transaction Mr. Musk was considering. Given the leak of PIF’s stake, he thought public disclosure
 2 was “the right thing to do.” CC ¶ 103; Ex. K. Plaintiff does not challenge that explanation. And
 3 even if, in retrospect, tweeting “may have been ill-advised,” the form of communication (a tweet)
 4 does not make it a fraud. *See SEC v. Lowy*, 396 F. Supp. 2d 225, 247 (E.D.N.Y. 2003).

5 *Third*, Mr. Musk stood to gain ***nothing*** by attempting to “mislead” shareholders, and his
 6 statements were made in good faith, based on the facts as he understood them at the time. As to
 7 funding secured, PIF had pursued a take private transaction for almost two years and had already
 8 invested billions of dollars to acquire Tesla stock on the open market. Given PIF’s enormous
 9 wherewithal, and Mr. Musk’s July 31 meeting with its senior decision-maker, Mr. Musk believed
 10 that PIF stood ready to fund a deal. *See* Exs. B, K. Moreover, based on Mr. Musk’s contemplated
 11 structure (in which he expected up to two-thirds of Tesla’s shareholders to remain, which would
 12 require far less than what PIF appeared willing to commit), he fully believed funding was no
 13 obstacle. *Id.* So, even though plaintiff quarrels with the words Mr. Musk used in his tweet, there
 14 is ***no factual basis*** to suggest that he did not genuinely believe them. *See Platform Wireless*, 617
 15 F.3d at 1093. Likewise, Mr. Musk had no reason to lie about the structure he “desired” or “hoped
 16 for.” And if Mr. Musk’s intent was to mislead by tweeting that the “only” contingency was a
 17 stockholder vote, he certainly ***would not have linked directly to a blog describing a whole range***
 18 ***of uncertainties*** (including that he had not even decided whether to pursue a transaction).

19 With no answers to the facts and inferences showing good faith, plaintiff relies almost
 20 entirely on SEC allegations against Mr. Musk without attribution (though no other “source” is
 21 identified). It is well established, however, that reliance on SEC allegations is insufficient since
 22 they “are unproved and are contested [and] may not be used to demonstrate scienter.” *Cho v.*
 23 *UCBH Holdings, Inc.*, 890 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (citing cases); *see also*
 24 *Glazer Capital Mgmt., L.P. v. Magistri*, 549 F.3d 736, 748 (9th Cir. 2008) (“The district court
 25 correctly held that these agreements [with SEC and DOJ] were not sufficient to meet the pleading
 26 requirements of the PSLRA”); *Irving Firemen’s Relief & Ret. Fund v. Uber Techs., Inc.*, 2018
 27 WL 4181954, at *7 (N.D. Cal. Aug. 31, 2018) (such allegations are “insufficient to show
 28 cognizable fraud”); *Veal v. LendingClub Corp.*, 2019 WL 5698072, at *16 (N.D. Cal. Nov. 4,

1 2019) (plaintiffs may not allege “facts” simply because they appear in government complaint,
 2 since “[b]eing accused of wrongdoing is not [a] basis for securities fraud”). That is especially true
 3 where, as here, Mr. Musk’s settlement with the SEC (as well as Tesla’s settlement) expressly
 4 preserves the unfettered “right to take legal or factual positions,” including the right to deny and
 5 fully defend against such claims, in this or any other litigation. Exs. S, T. Simply put, the SEC
 6 allegations are just allegations, not facts, and do not support the claims *in this case*.

7 But even ignoring the “source” of the allegations, they still do not suffice. As to Mr.
 8 Musk, the claim boils down to a complaint that he could have done “more” before his August 7
 9 tweets and blog post to ensure that funding was secured, that his desired structure would work,
 10 and that shareholders would support it. *See, e.g.*, CC ¶¶ 3-4, 64-65, 121, 123, 125, 141-51. At
 11 most, such allegations, if accepted as true, might be used to assert negligence, but they *do not*
 12 show that Mr. Musk deliberately sought to mislead investors. *See In re Facebook, Inc. Sec. Litig.*,
 13 2019 WL 46747237, at *28 (N.D. Cal. Sept. 25, 2019) (scienter could not be based on allegations
 14 that FTC Consent Decree put company “on notice,” where plaintiffs pleaded “no particularized
 15 facts from which this Court could infer that [defendant] consciously lied”); *see also DSAM*, 288
 16 F.3d at 389; *Zucco*, 552 F.3d at 991; *GoPro*, 2019 WL 1231175, at *22.

17 Recognizing as much, plaintiff offers various allegations about Mr. Musk’s well-known
 18 dislike for short-sellers. *See CC ¶¶ 50-52*. Mr. Musk is hardly alone. Many companies, executives
 19 and shareholders take a similarly dim view of short-selling:

20 *[W]hy is short-selling . . . a despised trading tactic? . . . it is natural to dislike people
 21 that benefit at the misfortune of others, which is precisely what short-sellers do – they
 22 make money when assets decline in value or when companies do not perform well . . .
 23 Certain commentators have observed . . . hedge funds that use the short-selling
 24 trading technique frequently manipulate the market to obtain their desired decrease . . . by publishing false negative research reports.*¹⁰

25 Accordingly, that an executive (and substantial shareholder) such as Mr. Musk dislikes short-
 sellers is to be expected and is the sort of generic motive allegation that are insufficient to show

26 ¹⁰ Ex. U, Lydie N.C. Pierre-Louis, *Hedge Fund Fraud and the Public Good*, 15 Fordham J. Corp.
 27 & Fin. L. 21, 72 (2009). See Ex. V, Jennifer Robichaux Carter, *Hedge Funds Should Be Able to
 28 Challenge Patent Validity Using Inter Partes Review Despite Mixed Motives*, 54 Hous. L. Rev.
 1315, 1329 (2017) (“[s]ome companies suspect short sellers are saboteurs willing to spread
 rumors about their enterprise to cause a stock price drop”).

1 scienter. *See Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir. 2002); *In re Silicon*
 2 *Storage Tech., Inc.*, 2006 WL 648683, at *19 (N.D. Cal. Mar. 10, 2006). Indeed, the notion that
 3 Mr. Musk suddenly decided to lie about a potential take private transaction (and assembled a
 4 team of advisors and set in motion the processes before and after his August 7 statements) **just to**
 5 **harm** short-sellers is nonsensical. As plaintiff concedes, Tesla’s stock price had already risen
 6 sharply in the days before the tweet after Tesla reported strong quarterly results on August 1,
 7 2018. *See CC ¶¶ 66-68*. So anyone shorting Tesla’s stock was in the red prior to August 7 based
 8 on Tesla’s business achievements alone. Moreover, the pretense that short-sellers were “harmed”
 9 during the class period defies reality: while Tesla’s stock price increased on August 7, it quickly
 10 declined below pre-tweet levels (*see Ex. T*), and short-sellers were exuberant, stating “the time
 11 has finally come for the great Tesla short.” *Ex. L (see CC ¶ 107)*.¹¹ In any event, such motive
 12 allegations are insufficient to show scienter. *See Lipton*, 284 F.3d at 1038.

13 V. TESLA DID NOT MAKE THE ALLEGEDLY ACTIONABLE STATEMENTS

14 Plaintiff bases his claim against Tesla entirely on Mr. Musk’s August 7 and 13 statements.
 15 Not only is plaintiff unable to plead that those statements are actionable, they are not attributable
 16 to Tesla as a matter of law. Only a defendant who “makes” an alleged misstatement can be liable
 17 under Section 10(b). *Janus Cap. Grp., Inc. v. First Deriv. Traders*, 564 U.S. 135, 141-42 (2011).
 18 “The **maker** of the statement is the person or entity with **ultimate authority** over the statement,
 19 including its content and whether and how to communicate it.” *Id.* at 142 (emphasis added).
 20 Preparing or publishing a statement for someone does not suffice. *Id.*¹² Because all challenged
 21 statements were “made” by Mr. Musk, the claim against Tesla fails.

22 “[I]n the ordinary case, attribution within a statement or implicit from surrounding
 23 circumstances is strong evidence that a statement was made by – and only by – the party to whom

24 ¹¹ Published reports indicate that short-sellers made a net profit of about \$1.2 billion during the
 25 alleged class period. *See Ex. Y*, Ihor Dusaniwsky, *S3 Analytics: No Tesla Short Squeeze, Shorts*
26 Up \$1.2 Billion Since “The Tweet” (August 17, 2018); *Ex. Z*, Claudia Assis, *Tesla short sellers*
are up \$1.2 billion since Elon Musk’s ‘going-private’ tweet, MarketWatch (August 19, 2018).

27 ¹² The Court explained that this rule “might best be exemplified by the relationship between a
 28 speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely
 within the control of the person who delivers it. And it is the speaker who takes credit – or blame
 – for what is ultimately said.” *Janus*, 564 U.S. at 143.

1 it is attributed.” *Janus*, 564 U.S. at 142-143. Here, all of the allegedly actionable statements were,
 2 on their face, attributed solely to Mr. Musk. *See CC ¶¶ 120, 122, 124, 126, 130, 139* (tweets from
 3 his Twitter account); *id. ¶ 128* (his email message to employees); *id. ¶¶ 134, 136* (blog post
 4 “written by [Mr.] Musk”). In fact, the Complaint quotes Mr. Musk confirming that the statements
 5 were *his*, rather than Tesla’s:

6 [W]hen I made the public announcement [on August 7], just as with this blog post
 7 and all other discussions I have had on this topic, ***I am speaking for myself as a***
potential bidder for Tesla.

8 *Id. ¶ 103* (emphasis added). The statements all relate expressly to Mr. Musk’s role “as a potential
 9 bidder for Tesla” (*id.*), as opposed to his position as CEO. Thus, in the original August 7 tweet,
 10 Mr. Musk said clearly that *he* was considering a go-private transaction. *Id. ¶ 74*. His subsequent
 11 statements reiterated the point. *Id. ¶ 84* (“I announced that I’m considering taking Tesla private”);
 12 *id. ¶ 103* (“As I announced last Tuesday, I’m considering taking Tesla private”); *id.* (describing
 13 initial board meeting of outside directors “to discuss ***my proposal***”) (emphasis added); *id. ¶ 134*
 14 (referring to the go-private transaction as “[m]y proposal”). Indeed, a prospective bidder such as
 15 Mr. Musk ***could not*** speak for Tesla regarding a potential transaction with the Company. That
 16 responsibility belonged to the independent members of the Board – a fact that those directors
 17 explicitly affirmed in the August 8 press release. Ex. J; CC ¶ 9; *see also id. ¶ 106*; Ex. M.

18 Not surprisingly, then, the Complaint lacks the requisite “specific facts” to establish that
 19 anyone other than Mr. Musk “had ultimate authority over the alleged misstatements.” *Hefler v.*
20 Wells Fargo & Co., 2018 WL 1070116, at *9 (N.D. Cal. Feb. 27, 2018); *see In re CytRx Corp.*
Sec. Litig., 2015 WL 5031232, at *7 (C.D. Cal. July 13, 2015). To the contrary, the Complaint
 21 suggests the ***opposite***, relying on: (i) an article asserting that “no-one [sic] had seen or reviewed
 22 [the] August 7, 2018 tweet” before Mr. Musk made it (CC ¶ 112); and (ii) the SEC’s complaint
 23 against the Company (*id. ¶¶ 116, 172*), which alleges that “no one at Tesla reviewed Mr. Musk’s
 24 tweets prior to publication.” *See Ex. Q, ¶ 32*. These averments clearly show that Tesla was not the
 25 “maker” of the statements at issue here. *See Hefler*, 2018 WL 1070116, at *9.

26 Nor does the allegation that several of Mr. Musk’s statements were posted on Tesla’s
 27 website (CC ¶¶ 128, 136) make them attributable to the Company. “Merely hosting a document

on a Web site does not indicate that the hosting entity adopts the document as its own statement or exercises control over its content.” *Janus*, 564 U.S. at 148 n.12. Similarly unavailing is the fact that years earlier (in a November 2013 SEC filing), Tesla said investors could obtain “additional information” by following Mr. Musk’s personal Twitter account (see CC ¶ 19).¹³ *Janus*, 564 U.S. at 148 n.12; see *Schaffer Family Inv’rs, LLC v. Sonnier*, 120 F. Supp. 3d 1028, 1043 (C.D. Cal. 2015) (individual did not “make” statements where he allegedly “forwarded [other] defendants’ unaltered emails” or “published the statements on their behalf”).

Plaintiff also cannot salvage his claim against Tesla with conclusory allegations of “apparent authority,” “*respondeat superior*” or “common law agency.” See CC ¶¶ 180, 182. Assuming *arguendo* that those doctrines are still viable post-*Janus* (they are not), plaintiff would need to allege facts showing that Mr. Musk issued the challenged statements in the course and scope of his role as CEO. See *Oaktree Principal Fund V, LP v. Warburg Pincus, LLC*, 2016 WL 6782768, at *11 (C.D. Cal. Aug. 9, 2016); *Jackson v. Fischer*, 931 F. Supp. 2d 1049, 1061 (N.D. Cal. 2013). However, each statement was explicitly made by Mr. Musk *personally*, in his capacity as a *potential bidder*, and cannot be imputed to Tesla. See *Oaktree*, 2016 WL 6782768, at *11-12.

VI. PLAINTIFF DOES NOT ADEQUATELY PLEAD LOSS CAUSATION

Loss causation requires plaintiff to trace a loss back to “the very facts about which the defendant [allegedly] lied.” *Mineworkers’ Pension Scheme v. First Solar, Inc.*, 881 F.3d 750, 753 (9th Cir. 2018); see *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 343 (2005). It must be supported by particularized facts. *In re Leapfrog Enter., Inc. Sec. Litig.*, 200 F. Supp. 3d 987, 1000 (N.D. Cal. 2016). Plaintiff does not satisfy that burden.

A. August 7 Statements

As to the August 7 statements, there is no allegation that facts purportedly misrepresented were ever revealed and caused Tesla’s stock price to drop. While the stock price declined on

¹³ Contrary to plaintiffs’ claim, Tesla did **not** say it “would use [Mr.] Musk’s Twitter account as a formal means of communication.” See CC ¶ 19. Instead, Tesla explained it would use “Tesla’s website, press releases, SEC filings, blogs and social media . . . to achieve broad, non-exclusionary distribution of information to the public.” Ex. O. It then provided links to its own website for “information on Tesla and its products,” “information for Tesla investors,” and “the latest information from Tesla.” *Id.* The cited 8-K went on to note that those interested in “additional information” could “follow Elon Musk’s and Tesla’s Twitter accounts.” *Id.*

1 August 8 and 9 (CC ¶¶ 191, 192), plaintiff does not tie those drops to a “corrective disclosure.”
 2 The only identified disclosure on August 8 was a press release (*id.* ¶ 191) noting the Board was in
 3 discussion with Mr. Musk about his possible interest in taking Tesla private. *Id.* ¶ 93. Nothing in
 4 that statement is alleged to be inconsistent with Mr. Musk’s statements; plaintiff merely notes that
 5 the independent directors “did not state that funding . . . had been ‘secured.’” *Id.* ¶ 191. But
 6 *silence* on funding is not a “revelation of fraudulent activity.” *Loos*, 762 F.3d at 887; *see also In*
 7 *re Intrexon Corp. Sec. Litig.*, 2017 WL 732952, at *7 (N.D. Cal. Feb. 24, 2017) (disclosures did
 8 not “reveal . . . something previously hidden or actively concealed”).

9 Plaintiff also suggests Tesla’s stock price dropped on August 9 following a report that the
 10 SEC had asked for information regarding Mr. Musk’s August 7 statements. CC ¶¶ 98, 192. But
 11 the mere “announcement of an investigation [by the SEC] does not ‘reveal’ fraudulent practices
 12 to the market,” and “without more, is insufficient to establish loss causation.” *Loos*, 762 F.3d at
 13 890; *see also Curry v. Yelp Inc.*, 875 F.3d 1219, 1225-26 (9th Cir. 2017); *N.Y Hotel Trades*
 14 *Council & Hotel Ass’n v. Impax Labs., Inc.*, 2019 WL 3779262, at *3 (N.D. Cal. Aug. 12, 2019).

15 As for Mr. Musk’s August 13 blog post (CC ¶ 193), it only underscores the inability to
 16 plead loss causation. There, Mr. Musk directly addressed the issues purportedly misrepresented
 17 on August 7: “funding secured,” his desired structure, and the status of a potential transaction and
 18 the many uncertainties. *Id.* ¶ 103. Thus, even if plaintiff could plead investors were misled on
 19 August 7, any misperceptions were removed – and the “truth” was revealed – by August 13. But
 20 critically, ***Tesla’s stock price did not fall*** in response; instead, the price ***rose***. CC ¶ 193; *see also*
 21 Ex. T. As a result, the August 13 blog (and market reaction) preclude plaintiff from establishing
 22 loss causation tied to August 7. *See Rok v. Identiv, Inc.*, 2016 WL 4205684, at *3 (N.D. Cal. Aug.
 23 10, 2016) (no loss causation where stock did not decline after alleged corrective disclosure).

24 Finally, the Complaint references price declines on August 14, 15 and 17 (CC ¶¶ 194-96),
 25 but is unable to link them to a “corrective disclosure.” Nothing revealed on August 14 –the
 26 formation of a special committee or reports that Mr. Musk’s advisors had not yet been formally
 27 retained (*id.* ¶ 194) – had anything to do with facts allegedly misstated on August 7. *See Cement*
 28 *Masons & Plasterers Jt. Pens. Tr. v. Equinix, Inc.*, 2012 WL 6044787, at *9 (N.D. Cal. Dec. 5,

1 2012); *Impax*, 2019 WL 3779262, at *3. Plaintiff attributes the August 15 drop to reports that the
 2 SEC had issued subpoenas to Mr. Musk and Tesla (*id.* ¶ 195) but those reports were ***not***
 3 ***corrective*** – they merely rehashed what was already reported. *See Bonanno v. Cellular*
 4 *Biomedicine Grp., Inc.*, 2016 WL 2937483, at *5 (N.D. Cal. May 20, 2016). And while plaintiff
 5 claims the August 17 price decline was caused by a *New York Times* article that supposedly
 6 “confirmed” the truth about the “‘funding secured’ tweet” and absence of a “definitive agreement
 7 to take Tesla private” (CC ¶ 196), that article revealed nothing new on those topics. Moreover, it
 8 was entirely ***consistent*** with what Mr. Musk said on August 13 when the stock rose. As a result,
 9 the absence of loss causation requires dismissal of any claim based on the August 7 statements.
 10 *See Bonanno*, 2016 WL 2937483, at *5-6.

11 B. August 13 Statements

12 Plaintiff fares no better trying to plead loss causation based on the August 13 statements.
 13 Plaintiff alleges Mr. Musk’s statement that he had “no question that a deal with the Saudi
 14 sovereign fund could be closed” (CC ¶ 137) was false, but cites no “corrective disclosure.” To the
 15 contrary, even after Mr. Musk announced on August 24 that he would not proceed with a
 16 transaction (after the class period, and hence after any alleged inflation was gone), he reiterated
 17 that “there [was] more than enough funding to take Tesla private.” *Id.* ¶ 115. With no revelation
 18 that funding was unattainable, loss causation is lacking. *See Equinix*, 2012 WL 6044787, at *9
 19 (no loss causation where allegedly misstated fact was not disclosed to the market).

20 The same applies to Mr. Musk’s statement that he would be “work[ing] with Silver Lake
 21 and Goldman.” CC ¶ 139. That statement was never revealed to be false; instead, plaintiff merely
 22 refers to later news reports that the advisors had *not yet signed* formal agreements. *Id.* ¶¶ 107,
 23 194. But on August 24 (post-class period), Mr. Musk confirmed that he had in fact “worked with
 24 Silver Lake [and] Goldman Sachs” (*id.* ¶ 115), so again there never was a “corrective disclosure,”
 25 and hence there can be no loss causation. *See Equinix*, 2012 WL 6044787, at *9.

26 VII. PLAINTIFF’S SECTION 20(a) CLAIM AGAINST THE DIRECTORS FAILS

27 Plaintiff’s inability to state a Section 10(b) claim against Tesla means the control person
 28 claim fails. *See Zucco*, 552 F.3d at 990. Even if that were not the case, plaintiff does not plead

1 that the directors exercised the requisite control over the allegedly actionable statements.

2 A defendant is liable as a control person under Section 20(a) only if he or she exercised
 3 actual power or control over a primary violator. *Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065
 4 (9th Cir. 2000). Bare conclusions do not suffice. *See Special Situations Fund III QP, LP v. Brar*,
 5 2015 WL 1393539, at *10 (N.D. Cal. Mar. 26, 2015). Nor is status as a director sufficient. *See*
 6 *Arthur Children's Trust v. Keim*, 994 F.2d 1390, 1396 (9th Cir. 1993). What is required are
 7 **specific facts** showing defendant's exercise of actual power or control over the primary violator.
 8 *See Sgarlata v. PayPal Holdings, Inc.*, 2018 WL 6592771, at *8 (N.D. Cal. Dec. 13, 2018).

9 Far from providing the requisite detail, the Complaint **barely mentions the directors**,
 10 doing little more than citing their positions and offering boilerplate descriptions of their
 11 responsibilities. CC ¶¶ 215-17. Such averments are unavailing. *See Flynn v. Sientra, Inc.*, 2016
 12 WL 3360676, at *17 (C.D. Cal. June 9, 2016); *In re Energy Recovery Inc. Sec. Litig.*, 2016 WL
 13 324150, at *26 (N.D. Cal. Jan. 27, 2016). Plaintiff's inability to plead facts showing the directors'
 14 power or control over the challenged misstatements is not surprising. As discussed above, Mr.
 15 Musk was not speaking **for Tesla** when he said he was considering a take private transaction.¹⁴
 16 Where no statement **by the Company** is at issue, there is no predicate corporate action on which
 17 to premise Section 20(a) liability. *See Paracor Fin., Inc. v. Gen. Elec. Cap. Corp.*, 96 F.3d 1151
 18 (9th Cir. 1996) (no claim where director was not authorized to act in connection with the security
 19 offering at issue); *Burgess v. Premier Corp.*, 727 F.2d 826, 832 (9th Cir. 1984) (no claim where
 20 director uninvolved with preparing prospectuses at issue).

21 To the extent the Complaint purports to offer more specific allegations, they only
 22 undermine the control person claim. Most importantly, plaintiff expressly alleges that "no one had
 23 seen or reviewed Musk's August 7, 2018 tweet before he posted it" (CC ¶¶ 6, 112) and that Mr.
 24 Musk "did not discuss the content of his August 7, 2018 tweets with anyone else prior to
 25 publishing them." *Id.* ¶ 166. Those allegations dispose of any claim that the directors "directed or
 26 exercised control over [Mr. Musk] who allegedly made the false and misleading statements."

27 ¹⁴ Indeed, plaintiff **does not** name Mr. Musk as a control person of Tesla under 20(a), which itself
 28 is a tacit admission that Mr. Musk was not speaking **for Tesla** on August 7 (or at any other time)
 with respect to taking Tesla private. *See* CC ¶ 215 (parties for purposes of the 20(a) claim).

1 *Energy Recovery*, 2016 WL 324150, at *26. Were it otherwise, it would be the rule, ***rather than***
2 ***the highly unusual exception***, where directors are properly named as defendants in securities
3 suits. (Tellingly, even the SEC did not assert a claim against them).

4 Plaintiff cannot circumvent that conclusion by alleging that Mr. Musk’s personal Twitter
5 account was “an official channel of communication.” CC ¶ 218. As discussed above, Tesla never
6 claimed to control his personal Twitter account or adopt his tweets as Company statements. And
7 there are no facts showing that the Director Defendants had any involvement in (or advance
8 knowledge of) the tweets. That is fatal to a control person claim. *See Energy Recovery*, 2016 WL
9 324150, at *26. Similarly, the allegation that Mr. Musk was subsequently “ordered” to refrain
10 from further tweets (CC ¶ 218) does not overcome plaintiff’s admission that the directors had no
11 advance knowledge of (let alone actual control over) the statements at issue. *Id.* ¶¶ 6, 112, 116.

VIII. CONCLUSION

13 Mr. Musk was “considering” taking Tesla private and truthfully disclosed what he
14 “hoped” and “envisioned” that might look like. Not only were his public statements entirely
15 consistent with what he told the Board privately days earlier, but every action he took before and
16 after his tweet reflected his good faith pursuit of the opportunity. Likewise, the process
17 undertaken by Tesla (which made no statement) and the directors (who are barely mentioned)
18 demonstrate their good faith, not fraud. The Complaint should be dismissed.

19 | Dated: November 22, 2019

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